

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:12-cv-01661

CITIZENS FOR A HEALTHY COMMUNITY,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, an agency of the United States; and
UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the United States
Department of the Interior,

Federal Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, CITIZENS FOR A HEALTHY COMMUNITY (“CHC”), alleges as follows:

I. INTRODUCTION

1. This action is premised upon, and consequent to, violations of both the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.* It challenges the unlawful decision of the Federal Defendants, the UNITED STATES DEPARTMENT OF THE INTERIOR, and UNITED STATES BUREAU OF LAND MANAGEMENT (collectively, “Defendants”), in response to Plaintiff’s FOIA request and administrative appeal.

2. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR (“the

Department”) has granted CHC’s administrative appeal in part and denied it in part. In its denial, the Department has unnecessarily, unreasonably, and unlawfully withheld and redacted (blacked-out) certain information responsive to CHC’s FOIA request, improperly asserting that such information is subject to withholding from disclosure pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

3. On December 18, 2011, CHC submitted a FOIA request to Defendant BUREAU OF LAND MANAGEMENT (“BLM”) seeking information regarding two things: first, the Expressions of Interest (“EOIs”) submitted for the parcels located in the BLM’s Uncompahgre Field Office (“UFO”) to be included in the now deferred August 2012 competitive oil and gas lease sale, including information identifying the persons or entities who submitted the EOIs and, second, all documents related to the EOIs listed above. BLM’s response invoked FOIA Exemptions 4 and 5 to withhold non-exempt information.

4. On January 26, 2012, CHC filed an administrative appeal.

5. After failing to respond to CHC’s appeal for over three months, the Department issued its administrative decision on April 30, 2012, wherein the Department granted CHC’s appeal in part and denied it in part.

6. The Department’s denial unlawfully withholds certain information responsive to CHC’s request.

7. Prompt access to the requested information is crucial to the CHC’s work pertaining to the parcels included in BLM UFO’s now deferred August 2012 competitive oil and gas lease sale, including CHC and the public’s ability to engage BLM’s decision-making process on a fully-informed basis. Defendants’ decision unlawfully withholds public disclosure of

information sought by CHC, information to which it is entitled and for which no valid disclosure exemption applies. Accordingly, CHC seeks declaratory relief establishing that Defendants have violated FOIA and the APA. Plaintiff also seeks injunctive relief directing Defendants to promptly provide CHC with the requested information on EOIs, as well as an order enjoining the Defendants from relying on an invalid regulation or practice in all future FOIA undertakings.

8. If it prevails, CHC will seek an award of attorneys' fees, costs, and other expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and FOIA, 5 U.S.C. § 552(a)(4)(E).

II. JURISDICTION & VENUE

9. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this civil action arises under the laws of the United States.

10. This action reflects an actual, present, and justiciable controversy between the Plaintiff and the Defendants; Plaintiff's interests will be adversely affected and irreparably injured if Defendants continue to violate FOIA and the APA as alleged herein.

11. The requested relief is authorized by 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 552, 705, 706.

12. The requested relief would redress the actual, concrete injuries to Plaintiff caused by the Defendants' failure to comply with duties mandated by FOIA and the APA, and the regulations promulgated pursuant to these federal statutes.

13. Plaintiff filed an administrative appeal on January 26, 2012, and has exhausted any and all available and required administrative remedies.

14. The challenged agency action is final and subject to judicial review pursuant to 5 U.S.C. §§ 552, 702, 704, & 706.

15. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district because the FOIA request was made on behalf of CHC, which is located in Hotchkiss, Colorado, and because some significant portion, if not all, of the records at issue are located in Colorado. Additionally, CHC has members and staff that work and/or reside within this judicial district. Assignment is proper in this district and division for the same reasons.

III. PARTIES

16. Plaintiff CITIZENS FOR A HEALTHY COMMUNITY is a non-profit 501(c)(3) grass-roots organization formed in 2010 for the purpose of protecting people and their environment from irresponsible oil and gas development in the Delta County, Colorado region. CHC's members and supporters include organic farmers, ranchers, vineyard and winery owners, sportsmen, realtors, and other concerned citizens impacted by oil and gas development. CHC brings this action on its own behalf and on behalf of its adversely affected members.

17. CHC's members and staff live in, use and enjoy the communities and landscapes affected by the challenged actions, and they plan to continue to do so in the future. CHC regularly reviews and comments on oil and gas proposals in their region, and relies upon BLM documents, including those received pursuant to FOIA requests, to do this work.

18. The relief sought by CHC would help remedy the injuries suffered by the Plaintiff and their members, as well as provide valuable and necessary information that will allow the

Plaintiff, and the general public, to engage in the Department decisionmaking process on a fully informed basis.

19. Defendants would be required to disclose currently withheld information regarding the submission of EOIs pertaining to the BLM UFO's now deferred August 2012 oil and gas lease sale, as well as be enjoined from relying on an invalid regulation or practice in all future FOIA undertakings.

20. The relief sought would redress these injuries.

21. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is an agency of the executive branch of the United States and is responsible for the management of nine technical agencies, including the Bureau of Land Management. The Department is responsible for hearing all administrative FOIA appeals, including the underlying administrative appeal and decision, here. In this managerial capacity, the Department is responsible for implementing and complying with federal law, including the federal laws implicated by this action. The Department's administrative decision unlawfully invoked FOIA Exemption 4 to withhold information responsive to Plaintiff's request.

22. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is an agency within the United States Department of the Interior and is responsible for managing public lands and resources in Colorado, including federal onshore oil and gas resources and the leasing program for those resources. In this managerial capacity, BLM is responsible for implementing and complying with federal law, including the federal laws implicated by this action. BLM's response to Plaintiff's FOIA request unlawfully redacted information responsive thereto.

IV. STATUTORY BACKGROUND

23. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, requires that an agency of the federal government disclose documents and information to any person except where the document falls under a specifically enumerated exemption. *See* 5 U.S.C. § 552(b).

24. The U.S. Supreme Court has stated: “[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act,” and later continued, “[c]onsistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.”

25. The specific language of Exemption 4 states that FOIA “does not apply to matters that are: . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

26. The specific language of Exemption 5 states that FOIA “does not apply to matters that are: . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

27. DOI has further issued guidance regarding the release of agency records through FOIA, providing: “[i]t is our policy to make records of the Department available to the public consistent with the spirit of the FOIA and the Privacy Act.” 43 C.F.R. § 2.2.

28. BLM policy states: “It is the policy of the BLM to make records available to the public to the greatest extent possible in keeping with the spirit of the Freedom of Information Act (FOIA).”

29. BLM policy further provides: “The intent of FOIA is based on openness to citizens and the informed consent of the governed.”

V. STATEMENT OF FACTS

30. On December 7, 2011, the BLM UFO announced its intent to offer 22 parcels and approximately 30,000 acres of Federal mineral estate located in Delta and Gunnison Counties, Colorado, at the August 9, 2012 competitive oil and gas lease sale. These parcels are primarily located on BLM-managed lands in direct proximity to the communities of Paonia, Crawford, Hotchkiss, and Somerset, as well as the Paonia Reservoir State Park (hereinafter, “North Fork Valley”).

31. According to BLM’s Colorado State Director, Helen Hankins, federal law “requires the BLM to offer lands nominated or requested [through EOIs] by industry or the public for oil and gas leasing.”

32. On December 18, 2011, CHC submitted a FOIA request to BLM seeking the following information:

The Expressions of Interest submitted for the parcels located in the Uncompahgre Field Office included in the August 2012 Oil and Gas Lease Sale, including information identifying the persons or entities who submitted the Expressions of Interest; and

All documents related to the Expressions of Interest listed above.

33. On December 23, 2011, BLM responded to CHC’s FOIA request, signed by Ms. Hankins, and released the requested EOIs that precipitated the August 2012 lease sale, but redacted (blacked-out) information identifying the persons or entities who submitted the EOIs, citing Exemptions 4 and 5 of FOIA, 5 U.S.C. §§ 552 (b)(4) and (b)(5).

34. Ostensibly, the decision to invoke Exemptions 4 and 5 originated from BLM Instruction Memorandum No. 95-164 (“IM 95-164”), dated August 14, 1995.

35. IM 95-164 establishes the policy: “All BLM offices hold as confidential the

names of all parties that file an informal EOI, even though those parties may not have requested confidential treatment, until two business days following the last day of the competitive lease sale.”

36. IM 95-164 identified that the following language be included in a letter of denial to those seeking this information:

This denial is pursuant to Exemption 4 of FOIA (5 U.S.C. 552(b)(4) (1988) and 43 CFR 2.13(c)(4), which permits an agency to withhold ‘commercial or financial information obtained from a person and privileged or confidential.’ See e.g., National Parks & Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), and Critical Mass Energy Project v. NRC, 942 F.2d 799 (D.C. Cir. 1991). In addition, the denial is pursuant to Exemption 5 of FOIA (5 U.S.C. 552(b)(5) (1988), which permits an agency to withhold commercial information, the release of which could harm the commercial interest of the U.S. Government by premature disclosure. See e.g., Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979). However, we will make the information available to you two working days after the competitive sale.

37. The preceding language in IM 95-164 was cited in BLM’s FOIA response to CHC.

38. On January 26, 2012, CHC filed an administrative FOIA appeal with the Department regarding BLM’s insufficient FOIA response, received by the Department on January 27, 2012, and assigned Appeal Number 2012-050.

39. In a letter, dated February 1, 2012, the Department’s FOIA Appeals Officer informed CHC that its appeal had been received, and further recognized that “FOIA requires an agency to make a determination on an appeal within 20 workdays after the receipt of such appeal.” 5 U.S.C. § 552(a)(6)(A)(ii).

40. Accordingly, the Department should have issued its appeal decision on or about February 27, 2012.

41. On or about March 5, 2012, Plaintiff's counsel called the Department's FOIA Appeals Officer to inquire about the progress of CHC's FOIA appeal. In a letter memorializing this conversation, dated March 5, 2012, the FOIA Appeals Officer provided: "the Department concludes that there is not sufficient information on the record for it to make a determination on whether the invoked exemptions apply to the withheld information," and later continued, "The Department has requested that each of the three submitters whose information the BLM has withheld provide their views on disclosure," with response letters from the submitters due to the Department no later than March 19, 2012.

42. On April 30, 2012, the Department's FOIA Appeals Officer issued a decision on CHC's administrative appeal, concluding that the Department would grant the appeal in part and deny it in part.

43. CHC's appeal was granted in part in that one of the entities submitting an EOI for the lease sale in question advised the Department that it did not object to disclosure and, therefore, the Department released an un-redacted copy of the EOI respective to this entity.

44. The Department also granted CHC's appeal with regard to Plaintiff's challenge concerning BLM's decision to invoke FOIA Exemption 5 as a basis to withhold the names and other identifying information of all of the entities, and agreed that this exemption does not apply.

45. CHC's appeal was denied in part in that the Department claimed that BLM properly invoked FOIA Exemption 4 to withhold the names and other identifying information for the other two entities that submitted EOIs.

46. With specific regard to Exemption 4, the Department recognized that the withheld information is not a "'trade secret' within the meaning of exemption (4) and the BLM has not

invoked this aspect of exemption (4) as a basis to withhold the information.”

47. Rather, the Department concluded: “the withheld information falls under the second category of information protected by exemption (4), i.e., ‘commercial or financial information obtained from a person [that is] privileged or confidential.’”

48. According to the Department, BLM’s Colorado State Office instructs the submitters of EOIs to ensure that they include “[y]our name or company name with the mailing address and telephone number.” The Department deemed this instruction to mean that the submission of this information was “required,” as interpreted by relevant case law.

49. Accordingly, the Department determined that “the analysis turns to whether disclosure of this information will have either of the following effects: (1) impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained.”

50. The Department concluded that disclosure “will not impair the government’s ability to obtain this required information,” but determined that disclosure is “likely to cause substantial competitive harm.”

51. On May 2, 2012, BLM UFO issued a press release announcing the deferral of all 22 parcels considered in the August 2012 lease sale in the North Fork Valley, opting to conduct additional analysis of the proposed lease parcels based on public input.

52. This deferral does not permanently remove these 22 parcels from consideration.

53. Therefore, the EOIs nominating these lands are still relevant to CHC’s work and are central to CHC and the public’s ability to engage BLM’s decisionmaking process on a fully informed basis.

54. CHC has been required to expend costs and to obtain the services of a law firm, consisting of attorneys and legal assistants, to prosecute this action.

VI. CLAIMS FOR RELIEF

**FIRST CLAIM FOR RELIEF
Violation of FOIA
(Denial / Unlawful Withholding)**

55. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

56. In response to CHC's FOIA request and appeal, the Defendants have provided some information to CHC, but have redacted and withheld other information.

57. In redacting information, the Defendants have unlawfully invoked FOIA Exemption 4. 5 U.S.C. § 552(b)(4).

58. FOIA Exemption 4 does not apply to the information being withheld by Defendants in this case and, thus, FOIA Exemption 4 is inapplicable to bar CHC's statutory right to the information's release. *See* 5 U.S.C. § 552(b)(4).

59. Defendants have violated CHC's rights under FOIA by unlawfully withholding information responsive to Plaintiff's FOIA request.

60. CHC has a statutory right to appeal the Defendants' unlawful decision under 5 U.S.C. § 552(a)(4)(B).

61. Defendants' reliance on IM 95-164 in unlawfully withholding this information represents a continuing policy in practice that threatens to perpetuate this unlawful denial for similar FOIA requests in the future.

62. Based on the nature of CHC's professional activities, it will undoubtedly continue to request information from Defendants pursuant to FOIA in the foreseeable future.

63. CHC's organizational activities will be adversely affected if Defendants are allowed to continue violating FOIA's disclosure provisions, as it has in this case.

64. Unless enjoined and made subject to a declaration of CHC's legal rights by this Court, Defendants will continue to violate the rights of CHC to receive public records under FOIA.

65. CHC has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552 (a)(6)(A), (a)(6)(C).

66. CHC is entitled to reasonable costs of litigation, including attorney's fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF

Violation of APA and FOIA

(Agency action was either arbitrary and capricious or an abuse of discretion)

67. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

68. Defendants have unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to provide to CHC documents responsive to its information request and administrative appeal that are not within the scope of any FOIA disclosure exemptions.

69. CHC has been adversely affected, aggrieved, and suffered a legal wrong as a result of the Defendants' failure and refusal to provide to CHC documents responsive to its information request, has injured CHC's interests in public oversight of governmental operations

pursuant to FOIA, and constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

70. Defendants' failure and refusal to provide to CHC documents responsive to its information request has injured CHC's interests in public oversight of governmental operations pursuant to FOIA in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law pursuant to the APA, 5 U.S.C. § 706(2).

71. CHC is entitled to costs of disbursements and costs of litigation, including reasonable attorneys' fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412.

VII. RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Order Defendants to promptly grant Plaintiff all of the information sought in this action;

B. Order Defendants enjoined from relying on an invalid regulation or practice in all future FOIA undertakings;

C. Declare Defendants' failure to disclose the documents requested by Plaintiff to be a violation of FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), as well as regulations and policies promulgated thereunder;

D. Declare Defendants' regulation or practice, pursuant to IM 95-164, to be unlawful under FOIA;

D. Award Plaintiff its costs and reasonably attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E), and 28 U.S.C. § 2412;

F. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 26th day of June 2012,

/s/ Megan Anderson O'Reilly

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